Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1971

## No. 72-243

**CLEAN AIR COORDINATING COMMITTEE,**

*Petitioner,*

vs.

**ROTH ADAM FUEL COMPANY,**
**CHICAGO COAL MERCHANTS ASSOCIATION,**
**ILLINOIS POLLUTION CONTROL BOARD,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner Clean Air Coordinating Committee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 3, 1972.

## OPINION BELOW.

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The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

## JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on July 3, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED.

1. Under the "expressly authorized by Congress" exception to the federal anti-injunction statute, may a federal court stay a state court injunction of state action when that state action was required by the Federal Clean Air Act for a federal pollution control program?
2. Do the implementation plan requirements under the Federal Clean Air Act constitute the assertion of a "superior federal interest" which permits a federal court injunction staying interference with such requirements by a state court action?
3. Is there, as several circuits have held, standing under the "superior federal interest" exception to the anti-injunction statute for a private person acting strictly for the public interest to protect the superior federal interest?

## STATUTORY PROVISIONS INVOLVED.

**28 U.S.C. §2283. Stay of State court proceedings**

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

**42 U.S.C. §1857c-4**

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

**42 U.S.C. §1857c-5**

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted

under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

**42 U.S.C. §1857c-5(a)(2)**

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

**42 U.S.C. §1857c-5**

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

**42 U.S.C. §1857d-1. Retention of State authority**

Except as otherwise provided in sections 1857f-6a, 1857f-6c(c) (4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or section 1857c-7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. §1857h-5

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b) (1) of this title), any determination under section 1857f-1(b) (5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

## STATEMENT OF THE CASE.

On December 31, 1970 the Clean Air Act (42 U.S.C. §1857 [1971]) was substantially revised because the air pollution problem affecting human health was more severe, more pervasive and growing at a more rapid rate than was generally believed. (p. 1 of U.S. Senate Report 91-1196). Because of the national scope of the problem, the federal government was mandated to begin immediately a program of promulgating national ambient air quality standards for various pollutants. Each state, due to its proximity to and knowledge of local pollution problems, was required to supply imput into the federal program. Within nine months after the promulgation of any federal ambient air quality standard for any pollutant, each state had to submit to the Federal Administrator of the United States Environmental Protection Agency ("Federal Administrator") its suggested plan as to how that air quality requirement could be achieved within its borders. (42 U.S.C. §1857c-5[a] [1], 1971). Because air pollution does not respect state borders and because of the need for national standards, each state plan had to contain provisions assuring that standards for one state would not interfere with air quality in neighboring states. (42 U.S.C. §1857c-5[a] [2] [E], 1971). Once the Federal Administrator finalized an implementation plan for a state, that state was forbidden from adopting emission standards or limitations which were less stringent than the standards or limitations contained in the particular finalized federal implementation plan. (42 U.S.C. §1857d-1, 1971). There had, in effect, been federal preemption of minimum standards. There was a provision for judicial review only within thirty days after the Administrator had acted,

providing that such review was taken in the United States Court of Appeals in which the state was located. (42 U.S.C. §1857h-5[b] [1], 1971).

National ambient air quality standards were promulgated for five pollutants including sulphur dioxide and particulate matter. Following requirements of federal law, the Illinois Pollution Control Board ("State Board") formulated a draft implementation plan for the pollutants involved and held public hearings on the draft plan as required by 42 U.S.C. §1857-c(a)(1). The Clean Air Coordinating Committee ("Committee"), a sizable unincorporated association devoted to air pollution control, participated in the public hearing testifying as to what was necessary for the protection of the health of its members.

After the hearings, as the State Board was about to formalize its suggested implementation plan, for transmission as required by federal law to the Federal Administrator for his consideration, an emergency injunction action was filed in state court to prohibit the State Board from passing on sections of its suggested plan dealing with the use of solid fuel in the Chicago Major Metropolitan Area. That state court suit was filed by respondents Roth Adam Fuel Company and Chicago Coal Merchants Association and alleged that a portion of the plan that the state would suggest, in effect, banned the use of coal for residential and commercial space heating in their marketing area. While preliminary ideas regarding the implementation plan had been communicated by the State Board to the Federal Administrator, the state court action would have prevented the formal passage and transmittal of portions of the Illinois implementation plan to the Federal Administrator as required by federal law and would also prohibit

such portions of the suggested plan from also being adopted as state regulations.

The Committee filed suit in the Federal District Court seeking a temporary restraining order (until service was obtained) and a preliminary injunction for a limited stay of the state court proceeding and it was continually made clear to the District Court that the Committe action was limited and was only against that part of the state court proceeding which prevented the passage and transmission of the implementation plan for *federal* purposes. The Committee contended that to that limited extent, the state court action was premature review of the federal implementation plan for Illinois when such review was limited to review in the United States Court of Appeals during a thirty day period after the Federal Administrator had accepted, revised, or replaced the plan that had been suggested by the State Board. (42 U.S.C. §1857h-5[b] [1], 1971).

The Committee pleaded jurisdiction under 28 U.S.C. §1331 due to a federal question and health damage in excess of the jurisdictional amount and, by amendment to the complaint, also claimed jurisdiction under 28 U.S.C. §1337 because the Clean Air Act was passed in the exercise by Congress of its commerce power and because failure of compliance would cause harm to the health of the Committee's members. The State Board and the United States Environmental Protection Agency were made nominal defendants. The United States Environmental Protection Agency was dismissed as a defendant by agreement and just before the District Court suit was stayed, the State Board had indicated that it was going to seek dismissal as a defendant and intervene as a plaintiff.

The Committee submitted an affidavit in support of its position by an assistant professor of environmental and

occupational medicine stating that the delay caused by the state court proceeding would delay federal regulations and that delay would delay steps toward compliance and a delay in steps for compliance would harm human health. No counteraffidavits were presented.

The day after the complaint was filed in the Federal District Court, Roth Adam Fuel Company filed a motion to dismiss based on nonservice (service was shortly gained and was thereafter not in question), and based on alleged lack of federal jurisdiction supposedly because no federal question was involved, and based on the federal anti-injunction statute (28 U.S.C. §2283 [1971]), which allegedly barred the relief sought.

Briefs were filed and arguments heard. The District Court then ruled that it and the state had "concurrent jurisdiction" and that its hand "will be stayed until further notice of this court".

The Committee appealed and the Seventh Circuit Court of Appeals held that the appeal from the type of stay order that had been entered was proper since that order "was the gravamen of the plaintiff's statutory claim". But the Court of Appeals then held that the District Court should have dismissed the suit because the relief sought was barred by the federal anti-injunction statute. The Committee had claimed that the anti-injunction statute was no bar to the relief sought because a superior federal interest (a national plan for control of air pollution) was involved and, independently, because the Clean Air Act expressly authorized such an injunction, for otherwise delays caused by premature state court review would destroy time limits under the act and thereby also would prevent required state imput which could occur only within certain time limits.

## REASON FOR GRANTING THE WRIT.

**THE DECISION BELOW, WHICH WILL HAVE REOCCURING EFFECTS, MISINTERPRETS THE INTERRELATIONSHIP BETWEEN THE CLEAN AIR ACT AND THE ANTI-INJUNCTION STATUTE LEADING TO AN EMASCULATION OF IMPORTANT SECTIONS OF THE CLEAN AIR ACT DESIGNED SPECIFICALLY TO PROTECT THE HEALTH OF THE CITIZENS OF THIS COUNTRY AND TO CAUSE STATE IMPUT INTO THE FEDERAL REGULATORY PLAN.**

The purpose of the revision of the Clean Air Act was "to provide a much more intensive and comprehensive attack on air pollution" and to "establish that the air is a public resource and that those who would use that resource must protect it from abuse, to assure the protection of the health of every American". (S. Rep. No. 1214, 91st Cong., 2d Sess. 4 [1970]). As was stated above, with statutory references, under these amendments national air quality standards were to be promulgated, there were to be federally established interstate and intrastate air pollution control regions, there was federal control over the final content of implementation plans submitted by a state for the implementation, maintenance, and enforcement of the federal air quality standards within the state's borders, and there was federal *pre-emption* in each state of the establishment of minimum limits and standards for emissions once the Federal Administrator finalized the implementation plan for a state. As was stated in the Senate report:

> "The Committee recognizes that the implementation plan is the principal component of control efforts for pollution agents for which national standards are established. It is this program which must be effective

> if the Nation is to achieve the quality of air which the bill would mandate in a relatively short period of time." (S. Rep. No. 1214, 91st Cong., 2d Sess. 14 [1970]).

It is this program that was intefered with by the state court suit.

It is clear that a superior federal interest is involved. Stated again, it is federal control of the national air pollution problem which is a problem that respects no state borders. The federal anti-injunction statute was not meant under such circumstances to prevent the stay by a federal court of state court proceedings interfering with the superior federal interest. *Leiter Minerals* v. *United States*, 352 U.S. 220 at 225-6 (1957). For instance, despite anti-injunction statute a federal court was permitted to enjoin a state court action under this principle to prevent interference with a local housing authority's participation in a federal plan for low income housing under the federal Housing Act, *United States* v. *Barrett*, 442 F. 2d 642 at 645-6 (4th Cir. 1971); and a federal court was permitted under this principle to enjoin a state court from enjoining state officials from carrying out acts required under the Federal Voting Rights Act of 1965. *United States* v. *Louisiana*, 265 F. Supp. 703 (E.D. La., 1966).

A private party has standing to properly assert the "superior federal interest" exception to the anti-injunction statute in the public interest as a support for the statutory scheme on which the operation of the superior federal interest is dependent. In *Studebaker* v. *Gittlin*, 360 F. 2d 692 (2nd Cir. 1962) Judge Friendly stated at page 698 that:

> "If the policy of the anti-injunction statute is superceded by the need for immediate and effective enforcement of federal . . . statutes, the fact that en-

> forcement here is by a private party rather than the (federal) agency should not be controlling."

See also *Tampa Phosphate* v. *Seaboard Coast Line*, 418 F. 2d 387 at 393-4 (5th Cir. 1969), cert. den. 397 U.S. 910 (1970), reh. den. 397 U.S. 1030 (1970), *Machesky* v. *Bizzel*, 414 F. 2d 283 at 287-292 (5th Cir. 1969). It is true that private parties have no standing to assert the "superior public interest" in a private dispute removed from the public interest (*Essex Systems* v. *Steinberg*, 335 F. Supp. 298 [S.D. N.Y., 1971]) and in cases in matters involving the N.L.R.B. where that agency, to the exclusion of the public, is by statute made the sole representative of the public interest (*Amalgamated Workers* v. *Edison*, 309 U.S. 251 at 264-5 [1940] cited *N.L.R.B.* v. *Nash-Finch*, 404 U.S. 1381 [1971]), but these situations are not involved in the present case. In this case the Committee is seeking to protect the statutory scheme in the public interest to protect health and has standing to assert the superior federal interest. In the Senate report on the 1970 amendments to the Clean Air Act it is stated:

> "The Courts have granted this review to those being regulated and to those who seek 'to protect the public interest in the proper administration of a regulatory system enacted for their benefit'." (S. Rep. No. 1214, 91st Cong., 2nd Sess. 41 [1970]).

Independent of the above legal arguments, there are compelling reasons for granting this writ for the protection of time schedules for health protection measures and to protect required state participation in the federal implementation plan process. As was shown in a quotation above, the implementation plan is the central process in meeting the national ambient air quality requirements. Such reasons and the provisions of the Clean Air Act bring

this case within the "expressly authorized by Congress" exception to the anti-injunction statute. (28 U.S.C. §2283 [1971]). This is, of course separate from the "superior federal interest" exception to that statute.

Under the Clean Air Act, when a national ambient air quality standard is promulgated, each state, with its familiarity with and proximity to pollution emission sources within its borders, had a mere nine month period in which it was required to start from scratch, consider all sources emitting the pollutant within its borders, propose a suggested plan for control of those sources to meet the new federal standard, give the public time to evaluate the plan, then hold public hearings on the suggested plan, review the testimony of the hearings, make any revisions in the suggested plan required by such testimony, formally pass on its final suggested plan, and transmit it to the Federal Administrator for his approval, modification, or complete revision. (42 U.S.C. §1857c-5[a] [1], 1971). It is clear regarding implementation plans that Congress knew "the bill would require a great deal in a short period of time . . . (and) The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan." (S. Rep. No. 1214, 91st Cong., 2nd Sess. 12 [1970]). On page 41 of that Senate report it was stated that:

> "In order to maintain the integrity of the sequences provided *throughout* the Act, the Bill would provide that *any review sought* must be filed within 30 days of the challenged promulgation or approval" (emphasis added).

Such review could be obtained only in the United States Court of Appeals. (42 U.S.C. §1857h-5[b] [1], 1971).

Despite this, the Court of Appeals held that the limitations on review only applied after the Federal Administrator had acted finally on the implementation plan, and thus there was no express authorization by Congress to stay any state court proceedings under the Clean Air Act. If there was no such congressional intent, then there could be a state court injunction proceeding (providing the "superior federal interest" would not warrant a stay of the state court proceeding) which would, as it has done in this case, delay state action on formally suggesting an implementation plan to the Federal Administrator. Such state trial court action is subject to state appellate court review which is then subject to state supreme court review and even possible review in this Court. When Congress gave states a nine month period to submit suggested implementation plans, as it was shown above, Congress knew that the states would be hard pressed to do the necessary technical work in that nine month period. With this tight schedule due to technical work, it is obvious that Congress did not intend that the state's portion of the federal implementation process would be subject to the various state trial and appellate court levels of review before finalization and transmission for federal review. Such state court review, if it did occur, would, as in this case, be instituted at the end of the nine month period and, conservatively speaking, could add at least a year to the process. Thus, any dissatisfied person or company could by state court review prevent the submission of a state's suggested implementation plan for consideration of the Federal Administrator and destroy the state's required imput into the process since if the state plan is not formally transmitted in final form within the nine month period, the Federal Administrator is required to promulgate its own plan or portions

thereof for the state and that process adds time to the process of achieving the final plan. Further, since the Court of Appeals decision permitted review before final action of the Federal Administrator's final action, the federal *proposal* of a plan for promulgation could also be subject to an injunction suit and appellate review of that suit, further delaying the finalized plan.

All of this was clearly not intended by Congress. Congress clearly intended that the state involved with its knowledge of the pollution sources within its borders should meet the requirement that it submit a suggested plan to control those sources to meet federal standards. This is especially true since, as was shown above, the federal implementation plan would pre-empt the states minimum implementation standards. Congress also clearly intended that its deadlines under the Act be met. This is made even clearer by the facts (1) that what would be delayed by state court review would include standards which were "requisite to protect public health" (42 U.S.C. §1857c-4[b][1], 1971); (2) that such state court review would be premature and improper by any standard because it was review of a nonfinalized plan which was subject to change by the Federal Administrator; and (3) that any person in the large group affected by the plan who had objections had the right to federal court review after the Federal Administrator finalized the plan. (42 U.S.C. §1857h-5[b] [1], 1971).

The "expressly authorized by Congress" exception to the anti-injunction statute applies when "an Act of Congress must have created a specific and uniquely federal right or remedy (in this case it involves the achievement of national air quality standards) enforceable in a federal court of equity, which could be frustrated if the federal court were

not empowered to enjoin a state court proceeding". *Mitchum* v. *Foster*, 40 U.S.L.W. 4737, (June 19, 1972). The federal act in this case could only be given its intended scope only by a stay of a state court proceeding for said proceeding destroys required state imput into the federal regulatory scheme because it causes the timetables for such imput to be violated involuntarily by states causing substituted imput; and also because it ruins federal timetables designed to protect human health. The intent of Congress is clear and the exception to the anti-injunction statute expressly applies. It is to be noted that it is no bar to such application that the Clean Air Act does not expressly refer to the anti-injunction statute or does not expressly authorize an injunction of a state court proceeding (*Mitchum* v. *Foster, supra*) or that the injunction power to prevent interference is implied and not stated (*N.L.R.B.* v. *Nash-Finch*, 404 U.S. 1381 [1970]). The Committee has standing to rely on this exception under basic standing concepts because it participated in the hearing that was enjoined from reaching a conclusion, because its members' health will be harmed by that injunction and because its members came within the ambit of the protection intended by the statute.

The situation in this case is of extreme importance since it involves a problem that can and will repeat itself. New air quality standards for pollutants found in coal such as mercury and for pollutants found in many other substances will require more implementation plans, as will changes in existing air quality standards. The grant of this writ is necessary so as to prevent a single dissatisfied person or company from halting required state imput into the federal implementation plan process and to prevent the delaying of deadlines to the detriment of human health as well as to the detriment of industry which needs lead time after a plan is developed to comply with it.

## CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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# In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 72-1304

CLEAN AIR COORDINATING COMMITTEE,
*Plaintiff-Appellant,*

v.

ROTH-ADAM FUEL COMPANY, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 711

WILLIAM J. LYNCH, *Judge.*

ARGUED JUNE 12, 1972 — DECIDED JULY 3, 1972

Before SWYGERT, *Chief Judge,* FAIRCHILD, and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* According to the verified complaint, plaintiff is an association whose membership consists of several "groups" and more than one thousand individuals. Its purpose is the promotion of air pollution control. Defendant Roth-Adam Fuel Company is a coal-selling corporation doing business in Illinois, and defendant Chicago Coal Merchants Association is a voluntary association representing retailers engaged in the sale of coal in Illinois. The other two defendants are the Illinois Pollution Control Board and the United States Environmental Protection Agency, both governmental agencies

whose purposes include air pollution control. Neither took any position with respect to this controversy although the state Board indicated its intent to intervene as a plaintiff.

According to plaintiff, on April 30, 1971, the United States Environmental Protection Agency adopted primary and secondary ambient air quality standards for particulate matter and sulphur dioxide under the Clean Air Act (42 U.S.C. § 1857 *et seq.*). Under that Act, each state "shall, after reasonable notice and public hearings, adopt and submit to the Administrator" of that agency a plan for the implementation, maintenance and enforcement of such standards within nine months after their promulgation by the Administrator (42 U.S.C. § 1857c-5 (a)(1)). Four months after the submission date, the Administrator must approve or disapprove such plan.

The Illinois Pollution Control Board proposed an implementation plan for air pollution control in Illinois on December 8, 1971. The Board simultaneously announced that its proposed plan would be modified in accordance with its regulations and in response to testimony at public hearings. The Illinois plan included proposed Rule 203(g)(1)(A) which concededly would result in a total ban on the use of coal for residential and commercial space heating purposes in the Chicago Major Metropolitan Area.[1] The Illinois plan was first submitted

[1] Plaintiff does not controvert defendants' description of said rule as limiting "the emission of particulate matter from existing solid fuel combustion sources located in the Chicago Major Metropolitan Area to 0.1 pounds of particulate matter per million btu of heat input in any one hour period." The Rule itself provides:

"(a) *Particulate Emission Standards and Limitations for Fuel Combustion Emission Sources.*

"(1) *Fuel Combustion Emission Sources Using Solid Fuel Exclusively.*

"(A) *Existing Fuel Combustion Emission Sources Using Solid Fuel Exclusively Located in the Chicago Major Metropolitan Area.* No person shall cause or allow the emission of particulate matter into the atmosphere from any existing fuel combustion source using solid fuel exclusively, located in the Chicago Major Metropolitan area, to exceed 0.1 pounds of particulate matter per million btu of actual heat input in any one hour period except as provided in sub-paragraph (C) of this Rule 203(g)(1)."

to the United States Environmental Protection Agency on January 30, 1972. On April 13, 1972, after a series of hearings, all of the proposed regulations of the Illinois Pollution Control Board were adopted by that board and submitted to the federal agency with the proviso that Rule 203(g)(1)(A) (which is not to become effective until May 30, 1975) should not be considered to ban the use of coal for space heating in residential and commercial buildings in the Chicago Major Metropolitan Area.[1]

On March 14, 1972, a few days prior to the filing of the federal suit, defendants Roth-Adam Fuel Company and Chicago Coal Merchants Association filed suit in the Circuit Court of Cook County, Illinois, to enjoin the Illinois Pollution Control Board from adopting Rule 203(g)(1)(A) or an equivalent rule. Plaintiff's federal suit prayed that those defendants be enjoined from proceeding any further with the state court suit.

Defendant Roth-Adam Fuel Company filed a motion to strike the complaint and to dismiss the cause, asserting *inter alia* that the district court had no jurisdiction and that the Federal Anti-injunction Act (28 U.S.C. § 2283) prohibited the issuance of an injunction against the state court proceedings. On March 31, the district court denied defendants' motion to strike the complaint and by agreement dismissed the United States Environmental Protection Agency as a defendant. A fortnight thereafter, the district court heard arguments on plaintiff's motion for a preliminary injunction and concluded that although it did not have exclusive jurisdiction of the subject matter, it had concurrent jurisdiction with the Circuit Court of Cook County. The district court decided that its hand "will be stayed until further notice of this Court."

On April 13, 1972, the Circuit Court of Cook County entered a temporary restraining order against the Illinois Pollution Control Board pending a hearing on the motion

[1] The proviso was based on the April 13, 1972, restraining order of the Circuit Court of Cook County and remains in effect under that court's April 27, 1972, preliminary injunction. See *infra*, pgs. 3-4. The proviso applies to the Illinois Pollution Board and does not bind the federal Administrator. (See Response of Defendants-Appellees to Motion for Injunction, p. 10, and their Response to Motion for Accelerated Briefing Schedule, p. 3.)

for preliminary and permanent injunctions. On April 27, 1972, that court entered a preliminary injunction enjoining the Illinois Pollution Control Board from adopting Rule 203(g)(1)(A) or its equivalent unless the rule should "provide for compensation to parties whose businesses are injured and to parties who are otherwise injured by the adoption of such rule."[3] An interlocutory appeal was taken to the Appellate Court of Illinois on April 28, 1972, by the Illinois Pollution Control Board, and it is to be heard on an expedited schedule. We also expedited the appeal from the district court's stay.

Defendants assert that the district court's stay order was not appealable. Although defendants contend that the district judge merely stayed his hand pending determination of the issues in the state court proceeding, plaintiff did not seek to litigate in federal court the same issues as were before the state court. Rather plaintiff sought to enjoin the defendants' proceeding in the state court, which proceeding was itself the gravamen of plaintiff's federal statutory claim.[4] Consequently, the district court's finding of concurrent jurisdiction and indefinite stay allowing the state court to proceed in effect constituted the refusal of a preliminary injunction within the meaning of 28 U.S.C. § 1292(a)(1). Under these circumstances, we hold that the district judge's failure to grant the preliminary injunction was appealable. *Weiss* v. *Duberstein*, 445 F.2d 1297, 1299 (2d Cir. 1971); *United States* v. *Lynd*, 301 F.2d 818, 822 (5th Cir. 1962); see *Allico National Corporation* v. *Amalgamated Meat Cutters*, 397 F.2d 727, 729 (7th Cir. 1968).

Defendants also contend that 28 U.S.C. § 2283, the federal anti-injunction statute, bars enjoining the state court proceedings. That statute provides as follows:

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[3] See Supplement to Response of Defendants-Appellees to Motion for Injunction, p. 2.

[4] Succinctly put, plaintiff claimed below and claims here that state court review delaying unqualified submission of the implementation plan to the Federal Administrator contravenes 42 U.S.C. § 1857c-5 by preventing compliance with the nine-month time limit for submission prescribed therein and 42 U.S.C. § 1857h-5(b)(1), which provides for review of the Administrator's action in approving or promulgating any implementation plan under Section 1857c-5 only in a United States Court of Appeals.

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In our judgement, none of the three exceptions applies, so that the district court should have dismissed this action. The second and third exceptions are not even arguably applicable. As the Supreme Court has recently explained, if this action "is not an 'expressly authorized' statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding * * * regardless of how extraordinary the particular circumstances may be." *Mitchum* v. *Foster*, 40 U.S.L.W. 4737, 4738 (June 19, 1972). Although "an authorization need not expressly refer to §2283," "in the present case we are directed to no 'express' authorization within even the most attenuated meaning of the term." *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511, 516. The language of the Federal Clean Air Act, even as illuminated by the legislative history, contains nothing which can fairly be interpreted as an authorization much less an "express authorization." An exception may be implied in favor of a federal agency "where its federal power pre-empts the field." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Here, however, the federal domain is not exclusive. "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained * * * ." 42 U.S.C. § 1857c-2(a); see also 42 U.S.C. §1857 (a)(3). So far we are not persuaded to read the term "responsibility" so narrowly as to exclude assurance through state court review that the state pollution board's proposed plan is a valid exercise of that board's state-given powers. It is significant too that here "it is [not] a public authority that seeks protection of that domain." *National Labor Relations Board* v. *Nash-Finch*

*Co., supra,* at 147; see *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220, 225-226. The United States Environmental Protection Agency has not seen fit to seek an injunction.

It may be that in an appropriate case where "there is little question that if the [federal agency] had sought the injunction * * *, § 2283 would not have blocked its way," a private suit which is "a necessary supplement" to agency action for enforcement of the specific provision in question may overcome the bar. *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692, 698 (2d Cir. 1966). Here, however, it is far from clear that even the United States Environmental Protection Agency could have surmounted the bar of § 2283. 42 U.S.C. § 1857c-5(c) provides for what action the Administrator of that agency shall take in the event a "State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed." In such event he "shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof * * *." If the state remains delinquent, these regulations must be promulgated within six months after the required submission date. This specific sanction is at least not clearly consistent with an authorization of the Administrator to sue for an injunction against state court proceedings delaying transmission of the complete implementation plan. Surely the Act fails to meet the test of "clearly creating a federal right or remedy enforceable in a federal court of equity, [which] could be given its intended scope only by the stay of a state court proceeding." *Mitchum* v. *Foster, supra* at 4740. Moreover, although the Federal Clean Air Act provides for citizen participation by way of public hearings on implementation plans (42 U.S.C. §§ 1857c-5(a)(1), 1857 c-5(c)) and by way of suit to enforce substantive emission standards or limitations (42 U.S.C. § 1857h-2), it can hardly be said that a private suit is a "necessary supplement" to agency action in seeking compliance with the phase of the Act dealing with time limitations. *Studebaker Corp.* v. *Gittlin, supra,* does not control this case. See *Essex Systems Co., Inc.* v. *Steinberg,* 335 F.Supp. 298 (S.D. N.Y. 1971).

As the defendants have pointed out, the regulation in question was promulgated by a state agency, *viz.*, the Illinois Pollution Control Board under the Illinois Environmental Protection Act (Ill. Rev. Stat. 1971, ch. 111-½, §§ 1001 *et seq.*). That regulation appears to be reviewable under §§ 1029 and 1041 of that statute, pursuant to the provisions of the Illinois Administrative Review Act (Ill. Rev. Stat. 1971, ch. 110, §§ 264-279). We have found no provision in the Federal Clean Air Act definitely prohibiting such review. 42 U.S.C. § 1857 h-5(b)(1), on which plaintiff relies, provides for exclusive United States Court of Appeals review of "the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 • • •," but says nothing about review of the proposals of state anti-pollution agencies. In view of the May 30, 1975, effective date for Rule 203(g)(1)(A), plaintiff has not satisfied us that the progression of the state appeal would unduly delay the regulation. This is especially so because the state already being delinquent according to plaintiff, the federal Administrator now is free to disapprove of the present court-imposed proviso to the Rule making it inapplicable to the Chicago area or he may propose his own regulation to be promulgated within six months after the original submission date, so that the scheme of the Federal Clean Air Act has not been thwarted by the state court suit.

Since our ruling is based on the Federal Anti-injunction Act, we need not consider the parties' other arguments with respect to the district court's jurisdiction. It is not alleged that the Administrator of the Environmental Protection Agency has yet approved or promulgated any implementation plan for Illinois, so that we as yet have no jurisdiction to review his action under 42 U.S.C. § 1857h-5(b)(1).

Treating the order appealed from as a denial of an injunction, it is affirmed. Since 28 U.S.C. § 2283 forbids the relief sought, the district court is directed to dismiss

the action. Costs on appeal are awarded appellees Roth-Adam Fuel Company and Chicago Coal Merchants Association.[*]

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

[*] The motion to dismiss the appeal was abandoned and is denied since plaintiff did file the requisite cost bond.

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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

**No. 72-243**

CLEAN AIR COORDINATING COMMITTEE,
*Petitioner,*

*vs.*

ROTH ADAM FUEL COMPANY, CHICAGO COAL MERCHANTS ASSOCIATION, ILLINOIS POLLUTION CONTROL BOARD,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

---

This is the brief of Respondents Roth Adam Fuel Company and Chicago Coal Merchants Association in opposition to the petition for a writ of certiorari filed herein. Respondent Illinois Pollution Control Board has not actively participated in the proceedings below, and it is not anticipated that said Respondent will participate in these proceedings.

### OPINIONS BELOW.

The ruling of the United States District Court for the Northern District of Illinois, Eastern Division has not been officially reported. The substance of said ruling is set forth

on page 3 of Petitioner's appendix. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported, but appears in Petitioner's appendix.

## JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

## QUESTION PRESENTED.

Does the Federal Clean Air Act contain an "express authorization" within the meaning of 28 U. S. C. § 2283 which would permit a United States District Court, at the instance of a private party, to enjoin proceedings in a state court?

## STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are adequately set forth in the petition.

## STATEMENT OF THE CASE.

This is an action by an unincorporated association filed in a United States District Court seeking to enjoin the enforcement of a preliminary injunction issued on April 27, 1972 by the Circuit Court of Cook County, Illinois against the Illinois Pollution Control Board, an agency of the State of Illinois. The state court injunction, which is presently on appeal in the Illinois Appellate Court, temporarily enjoins said state agency from adopting a certain state regulation issued pursuant to a state statute relating to particulate emissions.

In the proceedings in the Circuit Court of Cook County, Illinois, entitled *Roth Adam Fuel Company, et al* v. *Illinois Pollution Control Board, et al.*, No. 72 CH 1484, which action

petitioner seeks to enjoin, respondents challenged a proposed rule of the Illinois Pollution Control Board which would limit the emission of particulate matter from existing solid fuel combustion sources located in the Chicago Major Metropolitan Area. The effect of this rule, as admitted by the Illinois Pollution Control Board and as found by the Circuit Court of Cook County, Illinois, would be a total ban on the use of coal for residential and commercial space heating purposes in the Chicago Major Metropolitan Area. After an evidentiary hearing in the Circuit Court of Cook County, Illinois, that court (Hon. Nathan M. Cohen, Judge Presiding) entered on April 27, 1972, an order granting a preliminary injunction restraining and enjoining the Illinois Pollution Control Board from adopting the subject rule or any other rule which has a similar effect. On April 28, 1972, a notice of interlocutory appeal was filed by the Illinois Pollution Control Board which is also a respondent in this case. Accordingly, the state court proceedings are now pending on appeal to the Illinois Appellate Court.

The action pending in the state courts of Illinois does not attack or seek to invalidate any federal statute, or any rule or regulation of any federal agency, or any action of any federal agency, but is concerned solely with statutes and regulations of the State of Illinois and of the agencies of the State of Illinois. Neither the United States nor any Federal agency is a party to the state court proceedings.

During the pendency of the state court proceedings, petitioner commenced the present action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin the enforcement of the state court injunction. The relevant facts relating to the action in the district court are fully stated in the opinion of the United States Court of Appeals for the Seventh Circuit, which appears in the appendix to the petition herein. Briefly stated, the court of appeals refused to grant peti-

tioner's motion for a preliminary injunction and remanded the case to the district court with directions to dismiss the action, on the grounds that the federal anti-injunction statute, 28 U. S. C. § 2283 precluded the federal courts from enjoining the state court proceedings.

The United States Environmental Protection Agency, which had originally been named as a party defendant by petitioner, was dismissed at its request as a party defendant while the action was pending in the district court, and has taken no active part in these proceedings. The Illinois Pollution Control Board, the principal defendant in the state court proceedings and also a respondent in these proceedings, has not actively participated in these proceedings.

On or about July 27, 1972, the United States Environmental Agency, pursuant to 42 U. S. C., § 1857c-5(c), proposed as a substitute for the state rule which the Illinois Pollution Control Board was enjoined from adopting, a federal regulation which will regulate particulate emissions from residential and solid fuel combustion sources in the Chicago area by regulating the ash content of (rather that particulate emissions from) solid fuels which may be sold or used. Hearings on said proposed federal rule commenced in Chicago, Illinois on August 31, 1972. When and if adopted said federal regulation will, by operation of federal law, supercede Illinois law and regulations.

## ARGUMENT.

### I.

### The Decision of the Court of Appeals Is Not in Conflict with Decisions of Other Circuits, with State Law, or with Decisions of This Court.

The court of appeals in the present case has held that there is no express authorization in the Federal Clean Air Act, 42 U. S. C. § 1857 et seq., which would permit a

private party to invoke the jurisdiction of the federal courts to enjoin proceedings pending in a state court, and that petitioner's action is accordingly barred by 28 U. S. C. § 2283. This decision is not in conflict with decisions of other circuits.

Petitioner has cited *Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966) and *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969) as authority for the proposition that a private party is free from the prohibitions of 28 U. S. C. § 2283 where such party is attempting to enforce a "superior federal interest." *Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692 (2d Cir. 1966), involved an action by a private party for the enforcement of rights under the Securities Exchange Act, which action was a necessary supplement to action by the Securities Exchange Commission. The present case is not a supplement to action by any federal agency, and involves no potential or present activities of interest to the United States or any of its agencies. The United States Environmental Protection Agency, which was originally named as a party-defendant, was dismissed from this action with prejudice, and has not seen fit to intervene as a party-plaintiff.

In *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969) a private party was allowed to maintain an action in the federal courts to enjoin state court proceedings in order to protect constitutionally favored First Amendment rights. No such rights are involved in the present case.

In *United States* v. *Barrett*, 442 F. 2d 642 (4th Cir. 1971) and *United States* v. *Louisiana*, 265 F. Supp. 703 (E. D. La. 1966) cited by petitioner, both actions were commenced by the United States to enforce federally protected rights. Petitioner in the present case is a private party and neither the United States nor any federal agency has seen fit to intervene in this action to protect any "superior federal interests."

Finally, in *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (5th Cir. 1969), cert. den. 397 U. S. 910 (1970), reh. den. 397 U. S. 1030 (1970), the court held that the Interstate Commerce Act contained an express authorization for injunctive actions by private parties, which brought the plaintiff in that case within the exception to 28 U. S. C. § 2283. No such "express authorization" can be found in the Federal Clean Air Act. The decision of the Court of Appeals in the present case is accordingly not in conflict with the decisions of any other circuit.

In addition, the court of appeals in the present case has not decided an important state question in a way in conflict with applicable state law. No point of Illinois law entered into or was affected by the court of appeal's decision. The court of appeals merely applied a federal statute, 28 U. S. C. § 2883, to the facts of this case and refused to interfere with a proceeding pending in the courts of the State of Illinois.

Finally, the decision of the court of appeals in no way conflicts with any applicable decision of this Court. To the contrary, the court of appeals has correctly applied and followed the rule set forth in *Mitchum* v. *Foster*, ____ U. S. ____, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972), wherein this court stated at 92 S. Ct. 2155 that:

> "In short, if a[n] . . . action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be."

and further at 92 S. Ct. 2159-2160 that:

> "(I)t is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and

> uniquely federal right or remedy, enforceable in a federal court of equity, which could be frustrated if the federal court were not empowered to enjoin a state court proceeding."
>
> • • • • •
>
> "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."

Petitioner has yet to indicate wherein the Federal Clean Air Act "expressly authorizes" federal judicial intervention in pending state court proceedings, or wherein said act clearly creates a federal right or remedy enforceable in a federal court which can be effectuated only by a stay of state court proceedings.

In the present case, respondents have, in the state court proceedings which petitioner seeks to enjoin, sought review of *state* regulations of a *state* agency adopted pursuant to a *state* statute. Accordingly, the state court proceedings which petitioner seeks to enjoin do not interfere with any area of exclusive federal law. The United States Environmental Protection Agency is free to promulgate and adopt regulations for the State of Illinois pursuant to 42 U. S. C. § 1857c-5(c) and in fact has already commenced proceedings in this regard. Accordingly, a stay of the state court proceedings in the present case is not necessary to effectuate any federal right or remedy created by the Federal Clean Air Act. The decision of the court of appeals therefor is in accord with the applicable decisions of this court.

This court has, in its recent decisions, delt extensively with the subject of federal judicial intervention in state court proceedings. *Younger* v. *Harris,* 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); *Mitchum* v. *Foster,* ____ U. S. ____, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). Accordingly, none of the considerations governing review on certiorari

set forth in U. S. Sup. Ct. Rule 19 are present, and this case does not warrant or merit review by this court on certiorari.

## II.

### The Decision of the Court of Appeals Was Correct and Does Not Require Review by This Court.

The state court proceedings which petitioner seeks to enjoin present no challenge to any federal statute or regulation nor to the action of any federal agency, as said proceedings are directed against a regulation of a state agency adopted pursuant to a state statute. Neither the United States nor any federal agency are parties to or affected by the state court proceedings, nor have they indicated any interest in the present proceedings or taken any steps to protect any alleged "superior federal interests." Even the Illinois Pollution Control Board, the principal defendant in the state court proceedings and a nominal respondent in these proceedings, has taken no active interest in these proceedings.

The subject matter of this action, i.e. pollution control, does not rest exclusively in the federal courts. The Federal Clean Air Act contemplates the implementation and enforcement of pollution control programs by the several states. See 42 U. S. C. §§ 1857(a)(3), 1857c-2(a). Therefor, no exclusive federal jurisdiction over pollution control programs is created by the Federal Clean Air Act.

Accordingly, no "uniquely federal right or remedy" is being frustrated in the present case so as to justify a stay of state court proceedings by a federal court at the instance of a private party. As there is no express authorization in the Federal Clean Air Act which would permit such an invocation of federal jurisdiction, the Court of Appeals was correct in holding that 28 U. S. C. § 2283 is a complete bar to the maintenance of petitioner's action. *Mitchum* v. *Foster*,

___ U. S. ___, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). Where there are any doubts as to the propriety of a federal injunction against a state court proceeding, such doubts should be resolved in favor of permitting state courts to proceed in any orderly fashion to finally determine the controversy. *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng.*, 398 U. S. 281, 297, 90 S. Ct. 1739, 26 L. ed. 2d 234 (1970).

Since the Court of Appeals based its decision solely on 28 U. S. C. § 2283, the other arguments of the parties regarding the district court's jurisdiction were not considered. Respondents submit, however, that the court of appeals had ample reason to dismiss petitioner's action for lack of federal jurisdiction. No federal statute, federal regulation, or action of any federal agency, has been questioned or is involved in the state court proceedings. The district court therefor had no jurisdiction under 28 U. S. C. § 1331 (Federal question jurisdiction).

In regards to petitioner's claim that the district court had jurisdiction pursuant to 28 U. S. C. § 1337, while there is no doubt that Congress has validly exercised its power to regulate interstate commerce in enacting the Federal Clean Air Act, (which in part seeks to regulate the movement of pollutants across state lines) this does not, however, mean that a complaint "involving" the Federal Clean Air Act, which is filed by a private party, confers jurisdiction on a United States District Court under 28 U. S. C. § 1337. The present case is not a suit to abate pollution, nor has it been brought by the United States or any agency thereof. There is no provision in the Federal Clean Air Act which would serve to confer jurisdiction on a federal court pursuant to 28 U. S. C. § 1337 to entertain a suit by a private citizen to enjoin a state court proceeding.

The decision of the Court of Appeals was correct and in accord with the decisions of this court, and does not require review by this court.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1972

No. 72-243

CLEAN AIR COORDINATING COMMITTEE,

Petitioner,

vs.

SOUTH ADAMS FUEL COMPANY,
CHICAGO COAL MERCHANTS ASSOCIATION,
ILLINOIS POLLUTION CONTROL BOARD,

Respondents.

## REPLY MEMORANDUM OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## No. 72-243

**CLEAN AIR COORDINATING COMMITTEE,**

*Petitioner,*

vs.

**ROTH ADAM FUEL COMPANY,**
**CHICAGO COAL MERCHANTS ASSOCIATION,**
**ILLINOIS POLLUTION CONTROL BOARD,**

*Respondents.*

## REPLY MEMORANDUM OF PETITIONER

The brief of Respondent coal interests raises a multitude of arguments for the first time in the certiorari proceedings including Supreme Court Rule 19 reasons for certiorari not raised by petitioner, the assertion that only one question is involved, the claim that there is no federal jurisdiction because no federal question is supposed-

ly involved, and the issue of the noninvolvement of the Illinois Pollution Control Board ("State Board") and the Federal Administrator of the Environmental Protection Agency ("Federal Administrator").

Said respondents assert that the only question in the case is that of a private party using the "express authorization" exception to the federal anti-injunction statute. There are three questions, one involving the application of the "express authorization" exception but not involving standing of a private party to use that exception for no case law opposes such use, a second involving the "superior federal interest" exception to the anti-injunction statute and a third involving private party standing to use the "superior federal interest" exception. The questions themselves do not give a sufficient indication of the importance of granting certiorari.

Respondent begins its legal argument by making it appear that petitioner is relying for certiorari on reasons of conflicts between circuits, conflicts with state law and conflicts with decisions of this Court. Petitioner in its first brief did not rely on these conflicts as a reason for certiorari and respondent has raised them as straw men it could try to knock down. Petitioner requested certiorari because an important federal question involving the interpretation of a new federal law needed resolution by this Court for that question was not only important to this case but would reoccur throughout the country as implementation plans are constantly formulated under the Clean Air Act and because the decision below delays the application of federal regulations designed to stop presently occurring harm to human health, and affects state imput to such plans.

Because said respondents raised the question of conflicts between circuits, petitioner feels it must bring to the Court's attention three such conflicts. First, the Seventh Circuit holds that there can be state court review of the state suggestions for a federal regulation which were made under the terms of the federal Clean Air Act. That state proposal was part of a unitary process by which the Federal Administrator causes an implementation plan to become a federal regulation in force in a state and review of this process by statute can only occur in the United States Court of Appeals within thirty days after final action by the Federal Administrator. 42 U.S.C. §1857h-5(b)(1). The ninth circuit holds that when Congress designates a forum for judicial review of administrative action, such forum is *exclusive,* and that result does not depend on the word "exclusive" being in the statute providing for said forum. *UMC Industries* v. *Seaborg,* 439 F. 2d 953 at 955 (9th Cir. 1971).

Secondly, the Second Circuit in *Studebaker* v. *Gittlin,* 360 F. 2d 692 (1966) and the Fifth Circuit in *Tampa Phosphate* v. *Seabord Coast Line,* 418 F. 2d 387 at 392-4 (1969) held that private parties such as petitioner have standing to use the "superior federal interest" exception to the federal anti-injunction statute for public purposes in circumstances in which standing was denied by the Seventh Circuit in this case. Respondents have attempted to give those cases and others narrower meaning than they have, although petitioner admits that the use of the "superior federal interest" exception by a private party is highly limited, but in a way to permit use by petitioners in this case.

Thirdly, the Seventh Circuit decision is in conflict with portions of the Third Circuit's yet unreported decision of *Getty Oil* v. *Ruckelshaus* (No. 72-1419) which is the only other circuit decision dealing with the amended Clean Air Act. In that case Delaware proposed implementation plan provisions that were identical for a state regulation and also for transmittal to the Federal Administrator for his action as required under the Clean Air Act. The plant was adopted as a state regulation and was approved by the Federal Administrator as a federal regulation for Delaware. The court pointed out that Getty Oil could have appealed the state regulation to the state court and the federal regulation to the United States Court of Appeals within the limited time provided by 42 U.S.C. §1857h-5(b)(1). Getty instead filed a request for a variance from the state regulation with the state administrative agency, which if granted would have had to have federal approval because of federal preemption of minimum implementation plan standards. When the state did not proceed with granting Getty a variance, Getty obtained a preliminary injunction in state court against the enforcement of the state regulation, and when federal enforcement of the federal regulation (which was identical to the state regulation) was threatened, Getty attempted to obtain a temporary restraining order in federal district court against such enforcement. The Third Circuit held that the only review of the federal implementation plan process was exclusively in the United States Court of Appeals within thirty days of the Federal Administrator's final action on the plan. The Third Circuit went on to say at page 12 of the opinion that "Getty attempts to end run around the (Clean Air) Act

by seeking pre-enforcement judicial review before WARC (the state administrative agency) has had an opportunity to pass upon Getty's application for a variance, and before the (Federal) Administrator has had an opportunity to review any forthcoming state action." The Seventh Circuit has permitted such an "end run" as prohibited by the Third Circuit by permitting a state court to preempt the Federal Administrator's consideration of state suggestions for a federal regulation by enjoining the state from formalizing portions of the suggested plan that the state was to submit to the Federal Administrator under the terms of the Clean Air Act. The state court preemption of the Federal Administrator's considerations is contra to the above referred to provisions of the Clean Air Act which state that the Federal Administrator's considerations are only subject to limitations through judicial review in the United States Court of Appeals within a limited period after he has acted.

Respondent coal interests repeatedly raise the issue of the lack of involvement in this case by the State Board and the Federal Administrator. The coal interests predict in their brief that the State Board will not participate knowing that they have taken steps to prevent such participation. While assuring this Court that this is supposedly a state court matter, said respondents have told the state appellate court that it should not interfere with the injunction against the State Board "until a determination can be obtained from the United States Supreme Court" in this case. The State Board, to prevent itself from being whipsawed between the two cases by the tactics of the respondent coal interests, is not participating in this case. This has nothing to do with the

merits. In the trial court the State Board stated its intention to dismiss as a defendant and intervene as a plaintiff with the petitioner, but minutes later the judge stayed all proceedings. That stated intention is significant. The Federal Administrator is in an awkward position being forced to suggest substitute regulations because the state court injunction halted the State Board's formal transmittal. Respondent coal interests have refused to participate in federal hearings on the Federal Administrator's suggestions. However, this case should not revolve around respondents extra record innuendoes regarding the interest of other governmental entities and petitioner's forced extra record explanations. What is important is the questions and issues raised and these should be revolved on their own merits as they were resolved in a similar situation in *Studebaker* v. *Gittlin*, 360 F. 2d 692 (2nd Cir. 1966) where a private party enforced the Security and Exchange Commission regulations without that Commission or any other governmental entity being a party.

Respondent coal interests next raise the issue of federal jurisdiction, which was not reached by the appellate court. They claim that there is no jurisdiction under 28 USC §1331 because the case involves no federal question, but supposedly only deals with questions of state law. They neglect to make it clear that the state court proceeding has two effects, enjoining passage of a state regulation and at the same time, enjoining transmittal of finalized state recommendations for the Federal Administrator which is a part of the development of federal regulations for Illinois. If the state suggestions to the Federal Administrator meet federal statutory criteria, they

become federal regulations. (42 USC §1857c-5[a][2]). State regulations must meet the minimum standards set by the federal regulations (42 USC §1857d-1) and if state enforcement of the state regulations does not occur, the Federal Administrator enforces the federal regulations. (42 USC §1857c-8[a][1]). It should be obvious that what a federal official can enforce is a federal regulation, not a state regulation. The *Getty Oil* case, discussed above, makes the federal aspects clear. This action was only to enjoin interference with the federal aspects. The fact that the Federal Administrator is now considering its own implementation plan sections because the state court enjoined state imput does not change the fact of state imput rights and requirements under federal law and does not isolate what the state court did as a state law question. Where the act of a state court enjoining state officials from registering voters also interfered with the 1965 Federal Voting Rights Act, a federal question was involved. *United States* v. *Louisiana*, 265 F. Supp. 703 (E.D. La. 1966). A state court injunction of a state authority which interfered with a federal housing program involved a federal question. *United States* v. *Barrett*, 442 F. 2d 642 (4th Cir. 1971). Local acts affecting federal regulatory plans cause federal questions to arise. *Wickard* v. *Filbourn*, 317 U.S. 111 at 119-124 (1942) and *White* v. *United States*, 399 F. 2d 813 at 824 (8th Cir. 1968). If a state official was called to a congressional hearing to testify regarding what should be a federal regulation in his state, a federal matter is certainly involved and in this case which is similar, a federal matter is certainly involved supporting federal question jurisdiction.

Said respondents also claim that there is no federal jurisdiction under petitioner's alternative jurisdictional ground, 28 U.S.C. 1337. They admit that the Clean Air Act was passed by Congress in the valid exercise of its commerce power. *United States* v. *Bishop Processing*, 287 F. Supp. 624 at 629 (D. Md. 1969). But said respondents claim a private party cannot assert that jurisdictional ground. The law is contrary. Under that section a district court has jurisdiction over any civil action arising out of any act of congressionally regulated commerce without attempting a limitation with regard to actions brought by individuals. *Lyons* v. *Atlantic Coast Line*, 224 F. Supp. 1014 at 1016-17 (W.D. S. C. 1964) and cases cited therein.

Respectfully submitted,

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September 26, 1972

LE COPY

Supreme Court, U. S.
OCT 25
MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## No. 72-243

CLEAN AIR COORDINATING COMMITTEE,

*Petitioner,*

vs.

ROTH ADAM FUEL COMPANY,
CHICAGO COAL MERCHANTS ASSOCIATION,
ILLINOIS POLLUTION CONTROL BOARD,

*Respondents.*

## AMICUS BRIEF OF THE STATE OF MONTANA

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ILLINOIS POLLUTION CONTROL BOARD,

*Respondents.*

## AMICUS BRIEF OF THE STATE OF MONTANA

The State of Montana, by its Attorney General Robert L. Woodahl, pursuant to Supreme Court Rule 42(4) hereby requests that the Petition for a Writ of Certiorari be granted. The State believes that this Court should hear this case because it involves a reoccuring issue of substantial importance throughout the country.

Under the amendments to the federal Clean Air Act, many federal implementation plans will be formulated over the years for each state covering various pollutants. It was the clear intent of Congress that a state would supply the key input for every federal implementation plan for that state. It was also the clear intent of Congress that there would be adherence to federal time schedules for the development of such plans especially since they each included provisions necessary for the protection of human health. Contrary to such intent, the Seventh Circuit's decision would permit the halting of state input and a disruption of time schedules due to the initiation by any dissatisfied individual of a *premature* review proceeding before federal finalization of any implementation plan. That would be detrimental to the states and their residents.

Respectfully submitted,

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mentation plan a local regulation (Rule 203(g)(1)(A)) essentially banning all use of coal for residential and commercial space heating purposes in the Chicago metropolitan area.[1]

Respondent Roth Adam Fuel Company moved to dismiss the federal suit on grounds, *inter alia*, that the district court was without jurisdiction under 28 U.S.C. 1331 and 1337, and that it was, in any event, precluded by the federal anti-injunction statute (28 U.S.C. 2283) from enjoining the state court proceedings. Following a hearing, the district court determined that it had concurrent jurisdiction over the matter with the Circuit Court of Cook County; the federal court stayed its hand, however, pending further notice (Pet. App. 3). The court of appeals, "[t]reating the order appealed from as a denial of an injunction" (Pet. App. 7), affirmed. It concluded that the bar in the federal anti-injunction statute against federal court injunctions of state court proceedings applies in the circumstances presented, and it therefore remanded the case to the district court with instructions to dismiss.[2]

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[1] On April 27, 1972, the Illinois Circuit Court of Cook County entered a preliminary injunction against the Illinois Pollution Control Board, prohibiting it from adopting Rule 203(g)(1)(A) unless it contained a provision to compensate businesses which would be injured by adoption of the Rule. That ruling is presently pending on interlocutory appeal to the Illinois Appellate Court (Pet. App. 3–4).

[2] Because the court of appeals disposed of the case under the federal anti-injunction statute, it deemed it unnecessary to reach the other arguments relating to the district court's jurisdiction (Pet. App. 7).

2. The decision below is, in our view, correct and does not warrant further review by this Court. The state court proceedings involved here do not jeopardize "a superior federal interest" (Pet. 12), as petitioner contends. Nor is there anything in the Clean Air Act authorizing issuance of a federal injunction in these circumstances. Accordingly, dismissal of the suit is proper.

A. Petitioner's argument rests in part on a limited judicial exception to the federal anti-injunction statute, which recognizes that the United States may obtain an injunction against state court proceedings when it can show that the state proceedings, if not stayed, will have a direct adverse effect on federal interests. See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-226; *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144–147; *United States* v. *Barrett*, 442 F.2d 642, 645–646 (C.A. 4). In our view, however, even assuming *arguendo* that the "superior federal interest" argument is available to private litigants—a point on which the parties divide sharply (compare Pet. 12–13 with Opp. 5–6)[3]—the proceedings in the Illinois courts present no real threat to a federal project or policy.

[3] It is clear that the Clean Air Act does not itself provide for a private suit of this nature. As pointed out by the court below (Pet. App. 6), the federal statute contemplates "citizen participation" only "by way of public hearings on implementation plans (42 U.S.C. §§ 1857c–5(a)(1), 1857c–5(c)) and by way of suit to enforce substantive emission standards or limitations (42 U.S.C. § 1857h–2) * * *."

Petitioner's concern is apparently that the state litigation will unduly delay submission of a satisfactory Illinois implementation program to the Administrator of the Environmental Protection Agency (EPA), as contemplated by the Clean Air Act (42 U.S.C. 1857c–5), and thus will interfere with the federal "statutory scheme" (Pet. 12), which is designed promptly to improve the quality of air throughout the Nation. A brief look at that "statutory scheme," however, reveals that the state proceedings will have little impact on the federal program.

The Clean Air Act requires the EPA Administrator to promulgate national air quality standards necessary to protect the public health and welfare.[4] Such standards were adopted on April 30, 1971, 36 Fed. Reg. 8186, 42 C.F.R. 410.[5] Within nine months there-

[4] Section 109(a)(1) of the Act (42 U.S.C. 1857c-4(a)(1)) provides that, within 30 days of enactment, the Administrator "shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant" for which he had previously published air quality criteria. National primary ambient air quality standards are those standards "the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health" (42 U.S.C. 1857c-4(b)(1)). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator * * * is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [each] air pollutant [for which criteria have been established] in the ambient air" (42 U.S.C. 1857c-4(b)(2)).

[5] On August 14, 1971, the Administrator adopted Requirements for Preparation, Adoption, and Submittal of Implementation Plans. 36 Fed. Reg. 15486; 42 C.F.R. 420. Both regu-

after, or by January 31, 1972, each State was to submit a plan to the Administrator providing for "implementation, maintenance, and enforcement of" the federal air quality standards. 42 U.S.C. 1857c-5(a)(1). These state plans were to be approved or disapproved by the Administrator within four months after submission. 42 U.S.C. 1857c-5(a)(2).* The Act specifically provides that if a plan, or any portion thereof, is disapproved, the Administrator is required to prepare federal regulations setting forth a complete or, where appropriate, a partial implementation plan for the State. 42 U.S.C. 1857c-5(c)(2).

The State of Illinois submitted its implementation plan to the Administrator on January 30, 1972. Thereafter, on April 13, 1972, the State Pollution Control Board adopted various regulations relevant to the

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lations were promulgated on November 25, 1971, so as to appear in the same place in the Code of Federal Regulations. 40 C.F.R. 50, 51.

*Section 110(a)(2) of the Act (42 U.S.C. 1857c-5(a)(2)) specifically provides that the Administrator "shall approve" a state plan if "it was adopted after reasonable notice and hearing" and meets eight specified criteria. Each plan must contain: (1) provision for the attainment of primary standards "as expeditiously as practicable" and for the attainment of secondary standards within a specified "reasonable time"; (2) emission limitations and timetables necessary to insure attainment and maintenance of the primary and secondary standards; (3) provisions for establishment and operation of devices and techniques to monitor and analyze air quality; (4) procedures for review of the location of new sources; (5) provisions for intergovernmental cooperation; (6) provisions for adequate state support, private compliance, and reporting; (7) motor vehicle compliance inspection requirements; and (8) provisions for revision.

state plan and sent them to the federal agency. With respect to Rule 203(g)(1)(A), which is due to become effective May 30, 1975, subject to the state court proceedings challenged here, the Board added the proviso—consistent with the state court restraining order (see n. 1, *supra*)—that the Rule "should not be considered to ban the use of coal for space heating in residential and commercial buildings in the Chicago Major Metropolitan Area" (Pet. App. 3).

On May 31, 1972, the Administrator disapproved a portion of the proposed Illinois implementation plan, in part because it failed to provide for sufficient control of particulate emissions from residential and solid fuel combustion sources in the Chicago area. After waiting 60 days for the State to revise its plan to include pollutant controls in this area (see 42 U.S.C. 1857c-5(c)(3)), the Administrator, on July 27, 1972, proposed a federal regulation pursuant to Section 110(c) of the Act, 42 U.S.C. 1857c-5(c), regulating the ash content of solid fuels which may be sold or used in and around the City of Chicago.[1] Hearings on the proposed regulation were held on August 31, 1972.

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[1] The proposed regulation, 37 Fed. Reg. 15100, provides in relevant part:

> • • • (1) On and after the dates prescribed herein, no person shall offer for sale, sell, or purchase for use in any residential or commercial building which is located in Chicago, Ill., nor shall any person cause the use of, or use in any residential or commercial building which is

Thus, the state court proceedings in Illinois do not, as petitioner suggests, seriously jeopardize the federal clean air program. Congress clearly contemplated that many States would, for various reasons, be unable to submit to the EPA Administrator completely satisfactory implementation plans. It therefore devised a "statutory scheme" calling for a coordinated effort on the part of the federal government and the States to achieve national air quality standards. Where, as in this case, the State implemention plan is in some respects deficient, and the State is unwilling or unable to make the revisions necessary to conform the plan to national standards, the Clean Air Act explicitly provides for the promulgation of federal regulations to remedy the deficiency. Whatever might be the minimal delay that is caused by invoking this procedure—a delay that might have been avoided had the state court not been permitted to enjoin the adoption of Rule 203(g)(1)(A)—it is a delay which Congress fully anticipated and took into account in drafting the federal legislation.

Accordingly, we agree with the court of appeals that "the scheme of the Federal Clean Air Act has

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located in Chicago, Ill., any solid fuel which contains ash in excess of the following limits:

| *Maximum ash content* (*percent, by weight*) | *Compliance date* |
|---|---|
| 8.0 | December 31, 1973 |
| 2.0 | July 31, 1975 |

not been thwarted by the state court suit" (Pet. App. 7). Notwithstanding the state proceedings, a suitable implementation plan for the State of Illinois is being devised well within the general time-frame contemplated for accomplishing the objectives of the federal clean air program. Nor is the development of that plan without state participation. The contested state litigation deals with but one aspect of the plan submitted by the Illinois Pollution Control Board; in all other respects the State is integrally involved in implementing a program for Illinois that will enable that State to achieve the national air quality standards. And, even insofar as the ultimate plan concerns control of the particulate emissions involved here, the State still may have an opportunity to participate if the preliminary injunction entered by the Circuit Court of Cook County is reversed on appeal in the state courts. For the Clean Air Act provides that, even after the EPA Administrator has promulgated a regulation in this area, that portion of the implementation plan may be revised by the State if the revision satisfies all other statutory criteria. 42 U.S.C. 1857c-5(a)(3).

We therefore do not believe that either the policy or the underlying purpose of the Clean Air Act is adversely affected by the pending litigation in the Illinois courts. Petitioner's argument to the contrary, to avoid the anti-injunction prohibition in 28 U.S.C. 2283, fails to appreciate the "statutory scheme" on which it is based, and was properly rejected by the court below.

3. The court of appeals also correctly rejected petitioner's alternative contention that the Clean Air

Act "expressly authorized" the granting of an injunction in these circumstances and thus removed the bar of the anti-injunction statute. As this Court stated in *Mitchum* v. *Foster,* 407 U.S. 225, 238, the applicability of the "expressly authorized" exception in 28 U.S.C. 2283 turns on "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of the state court proceeding."

In the present context, there is, as we have indicated, no need for such a stay to carry out the objectives of the Clean Air Act as Congress intended. Congress has delegated to the EPA Administrator the responsibility in the first instance of reviewing, and, where appropriate, revising, state implementation plans that will achieve clean air standards. Federal judicial intervention is, by the terms of the Act (42 U.S.C. 1857c-5(f)(2)(B)), confined to appellate court review of the Administrator's decision to approve or disapprove the state plan, if suit is filed within 30 days of the contested decision. Nowhere does the statute suggest earlier consideration by the federal courts of implementation plans proposed by the various States. Accordingly, we agree with the court below (Pet. App. 5) that the injunctive relief sought by petitioner in this case finds no "express" authorization in the Clean Air Act "within even the most attenuated meaning of the term" (*Amalgamated Clothing Workers* v. *Richman Brothers Co.,* 348 U.S. 511, 516).

For the foregoing reasons, it is the view of the United States that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## No. 72-243

**CLEAN AIR COORDINATING COMMITTEE,**

*Petitioner,*

vs.

**ROTH ADAM FUEL COMPANY,**
**CHICAGO COAL MERCHANTS ASSOCIATION,**
**ILLINOIS POLLUTION CONTROL BOARD,**

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari entered on January 8, 1973, and (2) granting the petition.

After the petitioner submitted its briefs, the United States, at the invitation of this Court, submitted an amicus brief which stated that this Court should not hear this case because a substitute federal plan was scheduled to go into effect in 1975 close to the time that the enjoined state

suggested federal plan would have gone into effect so that there would be minimal harm. While in theory this is correct, in reality it is in error. Almost one year has passed since the state plan was supposed to be submitted to the federal government and there is yet no *final* plan of any type from *any* source for the implementation of the federal regulations regarding emissions from burning of solid fuel. The time already lost will undoubtedly destroy all chances of meeting any 1975 deadline. This is illustrated by recent testimony by the Chicago Board of Education at a local hearing regarding its attempts in a similar, but self imposed, plan begun in 1972 to convert all of its coal burning boilers by 1975. It was pointed out that such conversions could occur less than five months a year because the boilers were needed for possible cool or cold weather and during the limited time available for conversion, industry capacity to make conversions was limited. The homes and businesses involved herein cannot convert except during warm weather and the industry capacity which was found to be limited by the school system will certainly be limited in its ability to convert the thousands of homes and businesses involved. Due to the state court order preventing consideration of regulations for the federal plan, one of the three warm *full* seasons before July of 1975 has been lost for people are waiting for a final regulation to see what they are required to do. Congress permitted review of the regulations when they are finalized and that undoubtedly will cause the loss of another warm season destroying all practical possibilities of meeting the 1975 deadline for a plan to achieve air quality "requisite to protect the public health." (42 U.S.C. §1857c-4). The amicus brief says that this was anticipated and permitted. That is wrong. Congress did not intend the delay of both state and federal court review to destroy all time schedules. Under the federal act, state participation is integral in the sequences and review of such sequences was to be permitted only once, and that was only after

promulgation or approval of the state plan and only in the federal court. (S. Rep. No. 91-1196, 91st Cong., 2nd Sess. 41 [1970]).

Even if the regulations become final soon, the damage has already been done due to the state court injunction. Future implementation plans are forthcoming and if what occurred is permitted to occur again, industry will not have lead time to know and meet standards and deadlines will be impossibilities to everyone's serious detriment.

## CONCLUSION.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

RICHARD M. KATES

*Counsel for Petitioner*

## CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that the petition for rehearing is presented in good faith and is not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ RICHARD M. KATES

*Counsel for Petitioner*